

Securities and Exchange Commission

§ 240.3a51-1

§ 240.3a51-1 Definition of “penny stock”.

For purposes of section 3(a)(51) of the Act, the term “penny stock” shall mean any equity security other than a security:

(a) That is a reported security, as defined in 17 CFR 240.11Aa3-1(a) of this chapter;

except that a security that is registered on the American Stock Exchange, Inc. pursuant to the listing criteria of the Emerging Company Marketplace, but that does not otherwise satisfy the requirements of paragraph (b), (c), or (d) of this section, shall be a penny stock for purposes of section 15(b)(6) of the Act;

(b) That is issued by an investment company registered under the Investment Company Act of 1940;

(c) That is a put or call option issued by the Options Clearing Corporation;

(d) Except for purposes of section 7(b) of the Securities Act and Rule 419 (17 CFR 230.419), that has a price of five dollars or more;

(1) For purposes of paragraph (d) of this section:

(i) A security has a price of five dollars or more for a particular transaction if the security is purchased or sold in that transaction at a price of five dollars or more, excluding any broker or dealer commission, commission equivalent, mark-up, or mark-down; and

(ii) Other than in connection with a particular transaction, a security has a price of five dollars or more at a given time if the inside bid quotation is five dollars or more; *provided, however*, that if there is no such inside bid quotation, a security has a price of five dollars or more at a given time if the average of three or more interdealer bid quotations at specified prices displayed at that time in an interdealer quotation system, as defined in 17 CFR 240.15c2-7(c)(1), by three or more market makers in the security, is five dollars or more.

(iii) The term “inside bid quotation” shall mean the highest bid quotation for the security displayed by a market maker in the security on an automated interdealer quotation system that has the characteristics set forth in section 17B(b)(2) of the Act, or such other auto-

mated interdealer quotation system designated by the Commission for purposes of this section, at any time in which at least two market makers are contemporaneously displaying on such system bid and offer quotations for the security at specified prices.

(2) If a security is a unit composed of one or more securities, the unit price divided by the number of shares of the unit that are not warrants, options, rights, or similar securities must be five dollars or more, as determined in accordance with paragraph (d)(1) of this section, and any share of the unit that is a warrant, option, right, or similar security, or a convertible security, must have an exercise price or conversion price of five dollars or more;

(e) That is registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available pursuant to 17 CFR 240.11Aa3-1 of this chapter, provided that:

(1) Price and volume information with respect to transactions in that security is required to be reported on a current and continuing basis and is made available to vendors of market information pursuant to the rules of the national securities exchange; and

(2) The security is purchased or sold in a transaction that is effected on or through the facilities of the national securities exchange, or that is part of a distribution of the security;

except that a security that satisfies the requirements of this paragraph, but that does not otherwise satisfy the requirements of paragraph (a), (b), (c), or (d) of this section, shall be a penny stock for purposes of Section 15(b)(6) of the Act;

(f) That is authorized, or approved for authorization upon notice of issuance, for quotation in the National Association of Securities Dealers’ Automated Quotation system (NASDAQ), provided that price and volume information with respect to transactions in that security is required to be reported on a current and continuing basis and is made available to vendors of market information pursuant to the rules of the National Association of Securities Dealers, Inc.;

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except that a security that satisfies the requirements of this paragraph, but that does not otherwise satisfy the requirements of paragraphs (a), (b), (c), or (d) of this section, shall be a penny stock for purposes of section 15(b)(6) of the Act; or

(g) Whose issuer has:

(1) Net tangible assets (*i.e.*, total assets less intangible assets and liabilities) in excess of \$2,000,000, if the issuer has been in continuous operation for at least three years, or \$5,000,000, if the issuer has been in continuous operation for less than three years; or

(2) Average revenue of at least \$6,000,000 for the last three years.

(3) For purposes of paragraph (g) of this section, net tangible assets or average revenues must be demonstrated by financial statements dated less than fifteen months prior to the date of the transaction that the broker or dealer has reviewed and has a reasonable basis for believing are accurate in relation to the date of the transaction, and:

(i) If the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2-02; or

(ii) If the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the Commission or furnished to the Commission pursuant to 17 CFR 240.12g3-2(b); *provided, however*, that if financial statements for the issuer dated less than fifteen months prior to the date of the transaction have not been filed with or furnished to the Commission, financial statements dated within fifteen months prior to the transaction shall be prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

(4) The broker or dealer shall preserve, as part of its records, copies of the financial statements required by

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paragraph (g)(3) of this section for the period specified in 17 CFR 240.17a-4(b).

[57 FR 18032, Apr. 28, 1992, as amended at 58 FR 58101, Oct. 29, 1993]

§ 240.3a55-1 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.

(a) *Market capitalization.* For purposes of Section 3(a)(55)(C)(i)(III)(bb) of the Act (15 U.S.C. 78c(a)(55)(C)(i)(III)(bb)):

(1) On a particular day, a security shall be 1 of 750 securities with the largest market capitalization as of the preceding 6 full calendar months when it is included on a list of such securities designated by the Commission and the CFTC as applicable for that day.

(2) In the event that the Commission and the CFTC have not designated a list under paragraph (a)(1) of this section:

(i) The method to be used to determine market capitalization of a security as of the preceding 6 full calendar months is to sum the values of the market capitalization of such security for each U.S. trading day of the preceding 6 full calendar months, and to divide this sum by the total number of such trading days.

(ii) The 750 securities with the largest market capitalization shall be identified from the universe of all reported securities, as defined in § 240.11Ac1-1, that are common stock or depositary shares.

(b) *Dollar value of ADTV.*

(1) For purposes of Section 3(a)(55)(B) of the Act (15 U.S.C. 78c(a)(55)(B)):

(i)(A) The method to be used to determine the dollar value of ADTV of a security is to sum the dollar value of ADTV of all reported transactions in such security in each jurisdiction as calculated pursuant to paragraphs (b)(1)(ii) and (iii).

(B) The dollar value of ADTV of a security shall include the value of all reported transactions for such security and for any depositary share that represents such security.

(C) The dollar value of ADTV of a depositary share shall include the value of all reported transactions for such depositary share and for the security